

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireless Broadband Deployment)	WT Docket No. 17-79
by Removing Barriers to Infrastructure)	
Investment)	

**Comments of
The National Tribal Telecommunications Association**

I. INTRODUCTION AND SUMMARY

The National Tribal Telecommunications Association (NTTA) provides these brief comments in response to the Federal Communications Commission’s (FCC) Notice of Proposed Rulemaking in the above-captioned proceeding.¹

NTTA consists of Tribally-owned communications companies including Cheyenne River Sioux Telephone Authority, Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., Saddleback Communications, San Carlos Apache Telecommunications Utility, Inc., Tohono O’odham Utility Authority, and Warm Springs Telecom. NTTA’s mission is to be the national advocate for telecommunications service on behalf of its member companies and to provide

¹ *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (FCC 17-38) rel. April 21, 2017 (*NPRM*)

guidance and assistance to members who are working to provide modern telecommunications services to Tribal lands.

In these brief comments, NTTA supports comments previously filed by the National Congress of American Indians (NCAI), The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) and The National Association of Tribal Historic Preservations Officers (NATHPO)² and other Tribal entities as it relates to FCC comment sought on the National Historic Preservation Act (NHPA).

I. THE NPRM DOES NOT PRESENT A TRIBAL ENTITY VIEW

The first thing that strikes one reading the NPRM as it relates to the NHPA (and the National Environmental Policy Act, or NEPA) is the almost complete lack of the view point of Tribal entities that may be involved in the review of NHPA issues. In fact, from NTTA's perspective the entire rationale for adopting the NPRM can be and is stated succinctly by the FCC:

"Many wireless providers have raised concerns about the Commission's environmental and historic preservation review processes because, they say, these reviews increase the costs of deployment and pose lengthy and often unnecessary delays, particularly for small facility deployments."³

The NPRM, in arguing for the need for action, goes on to cite numerous statements from wireless carriers and others about the effects of Tribal review on wireless deployment, but not one statement from a Tribal entity's point of view. This fact is not lost on NCAI:

"It is important to note, however, that the experiences of Tribal Nations with the review process are absent from this document [NPRM], which focuses solely on the views and experiences of the industry."⁴

² Comments of NCAI, USET PRF, and NATHPO, filed April 18, 2017 in WT Docket No. 17-79 (*NCAI Comments*)

³ *NPRM* at 33

⁴ *NCAI Comments* at 18

This sole focus on wireless industry positions on the NHPA review process states clearly that the FCC has a conclusion in mind prior to gathering any data or observations from Tribal governments – that steps must be taken to dilute Tribal Nation authority under the NHPA in order to unfetter wireless carrier tower and other facility deployment. Not surprisingly, the FCC has received substantial pushback from Tribal entities. From NTTA’s perspective, it appears that the FCC is overreaching in its attempt to smooth the way for private sector deployment in Tribal areas. This is in direct contradiction to the FCC’s own Tribal Policy Statement⁵, the United States Constitution, and legal precedent. It also ignores the historical problems the United States has caused with the exploitation of Tribal areas.⁶

To the FCC’s credit, the need for Tribal consultation is discussed as some of the proposals made in the NPRM could “significantly or uniquely affect Tribal governments and their land and resources.”⁷ However, the NPRM appears to take a radically different approach in suggesting change is vital to the way Tribal entities act under the NHPA review process – only the alleged costs incurred by wireless carriers seems to be the driving force behind all the proposals.

II. THE NPRM IS PREMATURE

Besides presenting a one-sided argument for drastically changing the way Tribal Nations are required to interact with the NHPA, NTTA suggests the NPRM is premature. First, considering there are 567 federally-recognized Tribes that are potentially impacted by decisions made in this

⁵ *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement (FCC 00-207) rel. June 23, 2000 (*Tribal Policy Statement*)

⁶ See NCAI Comments at 20 “Since 1492, Tribal Nations within what is now the United States have, as a group, lost 98% of their aboriginal land base.”

⁷ *NPRM* at 24

proceeding, it does not appear to NTTA that the FCC has made any large-scale outreach to this large and heterogeneous group. Directing the Office of Native Affairs and Policy (ONAP) to “conduct government-to-government consultation as appropriate with Tribal Nations”⁸ in the NPRM is a proper step taken too late. The outreach should have taken place before the NPRM was released to the public. Second, had the FCC conducted its Tribal Nation outreach appropriately, it would have discovered that solutions to many, if not all, of the problems alleged in the NPRM already exist.⁹ Finally, the NPRM, by its very nature, seeks to adopt generic solutions to apply to a diverse group (Tribal Nations) with differing viewpoints, traditions, and priorities.¹⁰

The NPRM also appears to base its argument that changes are needed on a limited number of instances of alleged “bad acting” on the part of unnamed Tribal entities. Again, this does not consist of sufficient and reasonable need to radically revise the rules under which Tribal Nations comply with the NHPA’s requirements. For the most part, the Tribes rely on and work through the FCC’s Tower Construction Notification System (TCNS) to ensure any proposed wireless construction does not disturb any historic properties of religious and cultural significance. According to the NPRM, the TCNS “constitutes a reasonable and good faith effort to identify potentially interested Tribal Nations...”¹¹ NCAI notes the efficacy of the TCNS process in its comments:

⁸ *Id.*

⁹ See e.g., NCAI Comments at 5 “Prior intensive consultations between the FCC and USET, with industry involvement, have addressed in detail all of the issues presented in this NPRM.”

¹⁰ See e.g., comments of Wampanoag Tribe of Gay Head (Aquinnah), filed April 17, 2017 in WT Docket No. 17-79 at 1: “Every federally recognized tribe has its own government and ways of maintaining the preservation of their culture for their people.”

¹¹ NPRM at 30

“The TCNS has been a model for how the federal government, Tribal Nations and industry can work together in a meaningful way that encourages infrastructure development while respecting Tribal sovereignty.”¹²

However, nowhere in the indictment of (certain) Tribal nations’ inflation of costs incurred by the wireless industry does the FCC allege any shortcomings of the TCNS. Instead, the FCC criticizes the fees some Tribal entities may charge and whether those fees should be applicable in certain circumstances, and the geographic areas of interest claimed by some Tribes. To the extent there are substantial problems in these areas¹³, and Tribal commenters appear to effectively refute this premise, then any solutions need to be handled on case-by-case basis with the applicable sovereign Tribal government.¹⁴ What is not called for is an overall, generic set of rules applicable to all 567 Tribes.

In fact, a generic set of rules would appear to violate not only the intent of Section 106 of the NHPA, but also the FCC’s own pronouncements in adopting the 2004 Nationwide Programmatic Agreement (NPA). In the FCC’s Report and Order adopting the NPA, it was stated “the Commission has a responsibility to carry out consultation with any federally recognized Indian tribe or any NHO that attaches religious and cultural significance to a historic property that may be affected by a Commission undertaking.”¹⁵ What the FCC is attempting to do in the current NPRM is nothing less than delegating this well-established consultation obligation to a generic set of rules, all for the apparent sole benefit of wireless providers.

¹² *NCAI Comments* at 3

¹³ *Id.*, at 18-20

¹⁴ *Id.*, at 7: “if this [NPRM] is driven by what is termed ‘bad actors’ on the Tribal side as determined by the National Programmatic Agreement, the Commission is obligated to consult directly with said Tribal Nation to resolve differences and should not invoke a[n] [NPRM] to address specific situations.”

¹⁵ *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128 (FC 04-222), rel. October 5, 2004 at 91

III. TRIBAL SOVEREIGNTY DEMANDS A MORE FOCUSED APPROACH

The FCC's attempt, clearly motivated by wireless industry complaints, to adopt a generic set of rules under which Tribal governments must approach NHPA compliance is misplaced, improperly attempts to abdicate the FCC's Tribal consultation obligation, and wrongly weakens Tribal sovereignty. Instead, the FCC must better acknowledge Tribal sovereignty by, at most, clarifying the aspects of the NHPA under its jurisdiction (i.e., NCNS) that are most at risk for misunderstanding and may be causing inefficiencies in the system.

While NTTA and the wider Tribal community recognize the benefit of "the smooth deployment of the wireless communication system"¹⁶ the FCC must ensure such deployment is not "undertaken at the expense of tribal sovereignty, consultation, sacred sites, or cultural resources."¹⁷ The best and indeed only way to ensure these vital issues are properly addressed is to continue individual consultation with Tribal Nations affected by proposed wireless infrastructure construction. As succinctly stated by NCAI:

"In addition to recognizing Tribal sovereignty and upholding Tribal treaty rights, Federal agencies have a duty to fully respect and abide by the Federal trust responsibility to Tribal Nations and Indian people. Critical to this responsibility is acting in the best interests of Tribal Nations, as determined by them. Obtaining Tribal consent for Federal actions that affect them is the clearest way to uphold the trust responsibility."¹⁸

¹⁶ Comments of Wampanoag Tribe of Gay Head (Aquinnah) at 1

¹⁷ Comments of the Swinomish Indian Tribal Community, filed June 8, 2017 in WT Docket No. 17-79 at 2

¹⁸ NCAI Comments at 10

CONCLUSION

NTTA objects to the almost complete lack of Tribal consultation that has taken place in advance of the release of the *NRPM*. For the reasons noted above, NTTA urges the FCC to cease consideration of this NPRM until real and constructive Tribal consultation has taken place. NTTA supports the comments filed by NCAI, USET and NATHPO, the conclusion to which is as follows¹⁹:

“Tribal Nations are deeply concerned with the proposed policy changes contained in the NPRM. Not only do these changes have the potential to harm a largely functional Tribal review process and Tribal culture resources, they run counter to the intent of various laws, including the National Historic Preservation Act.”

“NCAI, USET SPF and NATHPO strongly urge the Federal Communications Commission not to proceed with this draft Notice of Proposed Rulemaking and to avoid taking further action on these dockets.”

“In the event that the Commission does move forward with this draft Notice of Proposed Rulemaking, the Commission must conduct government to government consultation with Tribal Nations across the Country. It is the Commission’s obligation to the United States’ 567 Tribal Nations to consult on any major changes to Federal Government processes that impact Tribal Nations. Thus far, the Commission has not conducted consultation in any form with Tribal Nations on this topic.”

Respectfully Submitted,

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June 15, 2017

¹⁹ *Id.*, at 24-25